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No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1. Did the Third Circuit incorrectly state that its decision in *Carter v. Rafferty*, 781 F.2d 993 (3rd Cir. 1986) was in conflict with those of other circuits?

2. Is it proper to hear this case on an interlocutory basis when any other procedure would be meaningless?

3. Is the refusal to consider an argument akin to a rejection of that argument on the merits?

4. Do the facts in this case require that a stay be granted?

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28 U.S.C. sec. 2254 1

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STATEMENT OF THE CASE

Petitioners rely on the statement of the case contained in their petition for *certiorari* with the following correction. Respondent was convicted of sexual assault under N.J. Stat. Ann. 2C:14-2c (West 1982).

REASONS FOR GRANTING THE WRIT

A Review of the Arguments Made By Respondent Demonstrates That The Writ Should Be Granted

In the petition for *certiorari* petitioners argued that the Third Circuit Court of Appeals had erred when it ruled in *Carter v. Rafferty*, 781 F.2d 993 (3rd Cir. 1986) that a federal court which is considering whether to order the immediate release of a state prisoner pursuant to 28 *U.S.C.* sec. 2254 may not even consider such factors as the prisoner's dangerousness to the community or the likelihood that the opposing party will prevail on appeal. We further argued that we were harmed by the district court's reliance on the *Carter* opinion. In opposition to this petition respondent argues that (1) the *Carter* opinion is not really in conflict with the opinions of other circuits; (2) the petition should be rejected solely because it was brought on an interlocutory basis; (3) the orders of the lower federal courts in this case turned on the particular facts of this case rather than the *Carter* opinion; and (4) the petitioners have not provided "serious argument" that respondent's release should be stayed pending appeal. In response to these arguments petitioners assert that (1) it is difficult to imagine a case in which a conflict between the circuits is more clear and certain; (2) this type of argument must be made on an interlocutory basis; (3) the district court in this case specifically relied on the *Carter* ruling rather than the facts of this case; and (4) we are extremely serious in arguing that respondent is a danger

to the community. These arguments will be addressed *seriatum*.

A. There is a Conflict Between the Circuits.

Respondent argues that no "real" conflict exists between the circuits in this case in that the portion of the *Carter* opinion to which we referred was mere *dicta*. (Rb13-12). Petitioners understand that conflicts between the circuits are sometimes exaggerated by those seeking to obtain a writ of *certiorari*. That is not the situation in this case. There can be no better evidence of a split between the circuits than a circuit court's statement that it rejects the rulings of other circuits. In *Carter*, the Third Circuit stated:

> *Some courts have held that more general "bail" standards may be considered by a court in regard to the release of a prevailing habeas petitioner.* See, *e.g. Walberg v. Israel*, 776 F.2d 134, 136 (7th Cir. 1985) (*likelihood of reconviction*); *United States ex rel. Taylor v. Redman*, 500 *F. Supp.* 453, 459 (D.Del. 1980) (*dangerousness*); *Sellars v. Estelle*, 450 *F.Supp.* 1262, 1265 (S.D. Tex. 1978) (*dangerousness*). In addition, one of the only cases attempting to give content to the "special reasons" language of Rule 23(d) considered relevant that a petitioner faced retrial on an additional charge of attempted murder of a police officer. *Lewis v. Henderson*, 356 F.2d 105, 106 (6th Cir. 1966).
>
> Apart from the fact that the term "bail" in the federal habeas context is a misnomer, see *Thomas*, 472 F.2d at 741, *we reject this approach. In the setting of federal habeas review, such factors are simply not relevant.* [781 F.2d at 997 n.5] (emphasis added.)

This footnote refers to the main issue presented to the *Carter* court and the main issue reached by that court.

Neither the Third Circuit in *Carter* nor the other circuits involved felt that these rulings involved *dicta*. Clearly, the *Carter* court felt that it was creating a conflict between the circuits and the rulings of the other circuits support this conclusion. (See Pb11 to 13).

B. This Court Should Grant *Certiorari* Even Though The Merits of the Underlying Appeal are Still Pending Before the Court of Appeals.

Respondent contends that this Court should deny this writ on the basis that the petition was brought on an interlocutory basis. If this argument was to be accepted this issue would never be determined by this Court in a meaningful case.

The relief requested before the district court and the Third Circuit was that respondent remain incarcerated pending appeal of the order requiring his release. Such a motion must of course be made prior to a determination of the merits of the appeal. Similarly, a denial of such a motion must be appealed on an interlocutory basis. If petitioners in this and similar cases await a final determination of the merits of the case in the Court of Appeals, the very purpose of this portion of the appeal—to incarcerate certain successful habeas corpus litigants pending appeal—would be rendered nugatory. This respondent and all similarly situated habeas corpus litigants would remain at liberty pending the final outcome of the appeals.

Petitioners therefore respectfully suggest that an order of a Court of Appeals denying a stay of release on federal habeas corpus grounds should be treated as final. This would be in conformity with this Court's rulings concerning the finality of orders denying bail. In *Stack v. Boyle*, 342 U.S. 1 (1951), petitioners not only argued that the federal district court which heard their motion for reduction of bail had abused its discretion to set bail within a zone of reasonableness but also contended that the bail which was set violated federal statutory and constitutional

standards. This Court ruled that since the district court did not have discretion to refuse to reduce excessive bail, the order of the district court was appealable as a final decision. *Id.* at 6. In *Flanagan v. United States*, 465 U.S 259, 104 S. Ct. 1051, 1055 (1984), this Court, expounding upon the *Stack* decision, stated that an order denying bail may be reviewed as a final judgment since "[t]he issue is finally resolved and is independent of the issues to be tried, and the order becomes moot if review awaits conviction and sentence." *Id.* In this case, the lower federal courts have not merely abused their discretion. Rather, we argue, they have refused to apply federal law in making their determination. Moreover, this issue has been fully litigated and respondent's dangerousness is independent of the issues raised on the merits of the appeal. Thus, the determination should be treated as final.

Even if this is not considered to be a final appeal and even if this case becomes moot by virtue of a future decision of the Court of Appeals, *certiorari* should be granted because this is a significant issue which is "capable of repetition" but will evade review. *Roe v. Wade*, 410 U.S. 113, 125 (1973). As noted above, an appeal of this type must be brought on an interlocutory basis if it is to have any meaningful purpose. Still, in almost all cases of this type (as in this case), the Court of Appeals will have the opportunity to render a decision on the merits prior to the time by which this Court could issue a full opinion on the legal standards which should have been applied. Thus, if full review is denied on the basis that this petition is brought on an interlocutory basis or on the ground that this case may become moot by virtue of a decision on the merits by the Court of Appeals, the important legal question which this case raises will go unanswered in this and all future cases. The erroneous standard set by the Third Circuit will continue to be followed by the lower courts in the circuit, and the people in the states encompassed by the Third Circuit will continually face the risk that dan-

gerous criminals will be released based on legal determinations which may well be overturned by the Court of Appeals. This must not be permitted.

C. The District Court Did Not Consider or Reject Our Arguments Concerning Our Chances Of Success On Appeal And Respondent's Dangerousness.

Respondent appears to agree that the State was given no opportunity whatsoever to press any claim concerning our chances of success on appeal while arguing before the district court for a stay of respondent's release. (Rb5 to 6).[1] Indeed, it would be impossible to argue to the contrary. (See Appendix B at 7a-4 to 11; Pa 13a-22 to 32). Respondent instead argues that if we had been given the opportunity to present this argument in the district court we would not have prevailed. We respond to this contention in subpoint D below. It should be noted, however, that respondent's argument in this regard ignores the purpose of the instant petition. We seek review in this Court not because the lower courts have made a factual error (in fact, they never made a factual determination), but rather because due to an error in interpreting federal law they have refused to allow us to present our factual contentions.

This error was caused by reliance on Third Circuit authority in *Carter*, *supra*, which can be reversed only by an *en banc* ruling of the Third Circuit (See Internal Op-

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[1] Respondent also contends that this case turned on its particular facts rather than on the law set forth in the *Carter* opinion. This argument is totally implausible. As noted in this subpoint the district court refused to even consider the issues which we presented because the *Carter* opinion did not allow it to do so. Respondent also contends that the Third Circuit rejected our factual contentions. We moved before the Third Circuit *en banc* for a stay. In this motion we requested that they first reconsider the *Carter* opinion and if the *Carter* opinion was rejected *en banc* that they consider our factual arguments. The court refused any reconsideration whatsoever. This cannot possibly be construed as a decision based on the facts of this case.

erating Procedures of the United States Court of Appeals of the Third Circuit 8.C.) or by a ruling of this Court. We requested that the Third Circuit reconsider *en banc* the ruling in *Carter*. The motion was denied. The present petition, therefore, is the only means available by which we may litigate the district court's refusal to even consider our arguments.

Respondent also argues that we were given a full and fair opportunity to argue the issue of dangerousness. This argument is strained. The transcript of the hearing indicates that the State repeatedly attempted to argue dangerousness and that the court repeatedly refused to consider this issue. The only issue the court considered was the possibility of flight. (Appendix B at 7a-14 to 15; 8a-30 to 9a-10; 9a-14 to 17; 13a-6 to 13). The opportunity to present an issue which the court feels it cannot consider and which the court does not consider can hardly be denominated "a full and fair opportunity to substantiate" a claim. (Rb4-12 to 13).

D. The Facts in this Case Require that a Stay be Granted.

Respondent's claims that petitioners' argument exists in a vacuum (Rb3) and that we are reluctant to discuss the record set forth in our appendix (Rb4) are incorrect. As noted in Subpoint C above, we were not allowed to make any argument concerning our chances of success on appeal and were allowed to make only limited argument concerning dangerousness. Rather than presenting arguments to this Court which we were precluded from making in the district court and rather than asking this Court to act as a court of errors which reviews factual disputes, we asked this Court to review an important federal issue. However, since respondent has made prolonged factual arguments which are incomplete, we must respond.

First, contrary to respondent's contentions and as noted in our brief to the Third Circuit, subsequent to committing

the present offense respondent was convicted of the crimes of burglary and theft. Thus, the present crime is not the only serious crime of which respondent has been convicted. Moreover, the evidence in the present case demonstrated that respondent attacked a 69 year-old woman in her apartment building, grabbed her by the throat and threw her to the floor while she pleaded with him to just take her money. Respondent placed a knife to the victim's throat. When she struggled to avoid having her throat slit she was cut on both hands. Respondent then forced the victim to perform fellatio. We believe that these facts in conjunction with respondent's record demonstrate respondent's dangerousness. At the very least they are factors which should have been considered by the federal courts.

With respect to our chances of success on appeal, it should be remembered that the New Jersey Superior Court, Appellate Division, agreed with the district court that the trial judge may well have committed error in not allowing respondent to present an alibi witness. That court ruled, however, that under the facts of this case any such error was harmless. This is precisely the argument which we have presented in our pending appeal.

The state court found that the properly introduced evidence led "overwhelmingly and inexorably to the conclusion of defendant's guilt." (Third Circuit Motion Appendix Ra 99). This evidence included the fact that two unrelated eyewitnesses made unhesitating and clear identifications of respondent. The victim gave a description of respondent which was corroborated by the eyewitnesses and identified respondent in court. Most importantly, respondent himself admitted on cross-examination that he was in the immediate vicinity of the scene of the crime within one-half hour of the time when the crime occurred. (Third Circuit Motion Appendix Ra 101 to 102). Based on these facts, the chances that the Third Circuit will reach the same result as the New Jersey court are great.

Respondent's apparent argument that the petition should be denied if this Court does not believe that petitioners would prevail on the facts inverts the issues. If the Third Circuit was correct in *Carter*, this Court should not reach the underlying factual allegations since they would not be cognizable. Thus before determining whether our arguments are factually correct this Court must determine whether they are legally relevant. Any other course would require this Court to make case by case factual determinations of factors before determining whether these factors should be considered.

E. Rule 23 Sets Forth a Rebuttable Presumption of Release.

In attempting to argue that the *Carter* decision correctly construes *Fed. R. App. P.* 23, respondent misconstrues many of our arguments.

Respondent states that petitioners opine that *Fed. R. App. P.* 23(b),(c) and (d) should be read in conjunction "simply because all three rules use the word 'enlargement.'" (Rb11-26 to 27). Obviously, we have not made any such argument. Rather, we have argued that these three sections of Rule 23 deal with the possible resolutions of a petition for habeas corpus and set forth interrelated presumptions concerning release from confinement based on those resolutions. As such we simply argue that the various subsections should be read in a vacuum.

Respondent also asserts that we merely pay lip service to the presumption in favor of releasing a successful habeas corpus litigant. This is a "straw-man" argument and totally misstates our position. We fully agree that there is and should be a presumption in favor of releasing a successful habeas litigant. We also feel, however, that reasonable rules have been adopted which make it possible to overcome that presumption in limited circumstances.

In a related vein, respondent argues that since dangerousness can be considered if it relates to a habeas

petitioner's ability to respond to process or in some other way relates to a federal issue (see *Carter v. Rafferty, supra* at 996-997), the community is protected. Obviously a person who is dangerous to the community may well be able to respond to federal process and no other federal concern under *Carter* may be susceptible of proof. Thus, under the *Carter* opinion a dangerous person will almost always be released. It should also be remembered that respondent's argument in this regard totally ignores the strong possibility that we may be successful on appeal.

In sum, petitioners have attempted to set forth a reasonable position which accepts the presumption that a successful habeas corpus litigant should be released absent a showing that factors exist which overcome this presumption. This position is in accordance with the previously prevailing custom in the jurisdiction (see *Morrison v. Kimmelman*, 752 F. 2d 918, 920 (3rd Cir. 1985), aff'd on other grounds, ___ U.S. ___, 106 S.Ct. 2574 (1986)) and fully comports with the applicable rules.

CONCLUSION

Based on all of the briefs in this case, petitioners believe that this case involves an important federal issue concerning which the circuits are in conflict. This Court has not heretofore resolved this issue. It is also clear that, although petitioners are primarily concerned with the broad legal principle which this case involves, based on the facts of this case respondent does present a danger to the community and our chances of success on appeal are great. Moreover, issues of this type must by their nature be raised on an interlocutory basis or not at all. Therefore, we respectfully request that this Court grant the petition, rule that dangerousness and the State's chances of success on appeal are factors which should be considered and either remand for a hearing at which these facts are considered by the lower courts or resolve these issues in our favor

and grant the stay based on the facts which are here presented.

Respectfully submitted,

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